

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

Case No. 8:03-CR-77-T-30TBM

HATIM NAJI FARIZ  
\_\_\_\_\_ /

**MOTION FOR RECONSIDERATION**  
**OF THE MAGISTRATE JUDGE'S ORDER DENYING IN PART**  
**MR. FARIZ'S MOTION FOR BILL OF PARTICULARS**

Defendant, HATIM NAJI FARIZ, by and through undersigned counsel, and pursuant to 28 U.S.C. § 636(b)(1)(A), hereby respectfully requests that this Honorable Court reconsider the Magistrate Judge's Order (Doc. 428) denying in part Mr. Fariz's Motion for Bill of Particulars (Doc. 252). As grounds in support, Mr. Fariz states:

**PRELIMINARY STATEMENT**

On September 5, 2003, Mr. Fariz filed his Motion for Bill of Particulars. (Doc. 252). Co-Defendants Sami Amin Al-Arian, Sameeh Hammoudeh, and Ghassan Ballut each separately filed motions for a bill of particulars. On January 21, 2003, the U.S. Magistrate Judge granted in part and denied in part the Defendants' motions for a bill of particulars. (Doc. 428).

Specifically, the Magistrate Judge's Order requires the government to provide the following particulars:

Regarding Count One: (1) the names of the unindicted coconspirators, numbered one through twelve; and

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(2) the identity of the individual(s) with whom Mr. Fariz allegedly spoke in Overt Acts 236 and 253, and about whom Mr. Fariz allegedly spoke in Overt Acts 240 and 247, presently alleged to be Abd Al Aziz Awda, to the extent that the government or its agents know the identity or identities.

Regarding Count Two:

(1) the identities of the coconspirators “associated with PIJ” who allegedly injured or killed individuals as alleged in the indictment, to the extent not otherwise revealed in discovery<sup>1</sup> and to the extent that the government or its agents know of the identities of these alleged coconspirators.

(Doc. 428 at 4-7, 10). The Magistrate Judge’s Order denies the remaining requests made in the Defendants’ motions for a bill of particulars. *Id.* at 7-10. Mr. Fariz respectfully seeks reconsideration before this Court of the decision of the Magistrate Judge denying in part his request for a bill of particulars.

### **STANDARD OF REVIEW**

This Court “may reconsider any pretrial matter under [28 U.S.C. § 636(b)(1)(A)] where it has been shown that the magistrate judge’s order is clearly erroneous or contrary to law.” 28 U.S.C. § 636(b)(1)(A).

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<sup>1</sup> The Magistrate Judge ordered the government to make available for inspection and copying all investigative materials related to the acts of violence alleged in the indictment within 30 days, or to otherwise show cause why these materials cannot be disclosed. (Doc. 428 at 6).

## ARGUMENT

**Mr. Fariz must be provided a bill of particulars, as requested, so that he may prepare his defense, avoid surprise at trial, and plead double jeopardy, particularly in light of the complex allegations, volume of discovery, large number of alleged participants, and the wide-ranging geographic and temporal scope of the case.**

Pursuant to Federal Rule of Criminal Procedure 7(f), this Court “may direct the government to file a bill of particulars.” Fed. R. Crim. P. 7(f). As the Eleventh Circuit has indicated, “[t]he purpose of a true bill of particulars is threefold: ‘to inform the defendant of the charge against him with sufficient precision to allow him to prepare his defense, to minimize surprise at trial, and to enable him to plead double jeopardy in the event of a later prosecution for the same offense.’” *United States v. Anderson*, 799 F.2d 1438, 1441 (11th Cir. 1986) (quoting *United States v. Cole*, 755 F.2d 748, 760 (11th Cir. 1985)). The Eleventh Circuit has further explained that “[i]t is well settled law that ‘where an indictment fails to set forth specific facts in support of requisite elements of the charged offense, and the information is essential to the defense, failure to grant a request for a bill of particulars may constitute reversible error.’” *Cole*, 755 F.2d at 760 (quoting *United States v. Crippen*, 579 F.2d 340, 347 (5th Cir. 1978)).

This Court has broad discretion to determine whether a bill of particulars is appropriate in this case. *Cole*, 755 F.2d at 760. The Magistrate Judge’s Order generally reflects the appropriate standard in considering whether to grant a request for a bill of particulars, and generally recognizes the three functions of the bill of particulars. (Doc. 428

at 2-4). In ordering the disclosure of some particulars – namely the identities of unindicted coconspirators numbers one through twelve, the identity of the individual(s) referred to in Overt Acts 236, 240, 247, and 253, and the identities of the coconspirators “associated with PIJ” who were involved in the attacks referenced in the indictment – the Magistrate Judge considered the nature of the case (the breadth of the allegations and voluminous discovery) and found that the particulars were warranted in the interests of justice and in order to expedite the Defendants’ investigations. *Id.* at 4.

In denying the remaining requests for particulars, the Magistrate Judge, however, failed to apply the same standard and therefore failed to recognize that the requests, particularly in light of the unique circumstances of this case, were designed to ensure that Mr. Fariz was sufficiently informed of the charges so that he could prepare his defense, avoid surprise at trial, and plead double jeopardy. In the absence of the requested particulars, Mr. Fariz is concerned that he will be unable to prepare his defense adequately and will be subject to surprise at trial. *See Cole*, 755 F.2d at 760 (indicating that the Eleventh Circuit will “reverse a district court’s refusal to grant a request for a bill of particulars only if it can be shown that the defendant was actually surprised at trial and thereby incurred prejudice to his substantial rights”).

Specifically, the Magistrate Judge summarily denied the remaining of Mr. Fariz’s and the Co-defendants’ requests for a bill of particulars, stating that the sheer number and nature of the requests demonstrated that the requests were designed for discovery purposes, rather

than to protect against insufficient notice and plead double jeopardy. (Doc. 428 at 4 & n.7). The Magistrate Judge failed to recognize, however, that the number and nature of the requests is actually reflective of the fact that the indictment is both lengthy and vague.<sup>2</sup> To the extent not granted or otherwise addressed elsewhere, Mr. Fariz reasserts his request for a bill of particulars in its entirety (Doc. 252), but respectfully focuses this Court's attention on the need for the following requests, grouped by category:

**1. Identities of Individuals in the Indictment**

While the Magistrate Judge ordered the government to disclose the identities of certain individuals, Mr. Fariz requested that additional identities be revealed, namely:

- (a) unnamed or unindicted coconspirators in each of the alleged conspiracy counts. *See* Doc. 252, Count One Request 1; Count Two Request 2; Count Three Request 4; and Count Four Request 4;
- (b) names of all alleged "designated foreign terrorist organizations" to which Mr. Fariz allegedly conspired to provide material support. *See id.*, Count One Request 16;

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<sup>2</sup> Moreover, as to the number of requests, some of Mr. Fariz's requests were repeated for each of the counts alleged, such as the request for the names of the coconspirators, the dates of Mr. Fariz's alleged involvement in the conspiracies, and so forth, and therefore the number of requests is somewhat overstated.

- (c) names of any “known terrorists” described in paragraph 32(b) of the indictment, alleged to have been invited to speak at conferences and seminars. *See id.*, Count One Request 25;
- (d) names of martyrs, detainees, and their families. *See id.*, Count One Requests 31-33;
- (e) members of the Palestinian Islamic Jihad (“PIJ”). *See id.*, Count One Request 38;
- (f) terrorist organizations, if any, with which Mr. Fariz allegedly associated. *See id.*, Count One Request 39;
- (g) names of “terrorists” to whom assistance was given, through false statements and otherwise. *See id.*, Count One Request 43;
- (h) names of “influential individuals” referred to in paragraph 42 of the indictment. *See id.*, Count One Request 46; and
- (i) identities of persons or entities in the media to whom false statements and misrepresented facts were made, as alleged in paragraph 42 of the indictment. *See id.*, Count One Request 47.

The Magistrate Judge acknowledged the breadth and volume of the allegations and discovery in this case. As Mr. Fariz argued in his Motion for Bill of Particulars, this case involves complex allegations, spans a wide geographic and temporal scope, and alleges the

involvement of a large number of participants. While the Magistrate Judge recognized the unique circumstances of this case and found that some particulars concerning individual identities were warranted, the ordered particulars will not satisfy the purpose of the bill of particulars in providing sufficient notice to Mr. Fariz so that he may prepare for his defense and avoid surprise at trial. The indictment alleges actions on the part of Defendants and “others, known and unknown, being employed by and associated with the [alleged] enterprise,” *see* Doc. 1 at 9 (Count One); “enterprise members,” *see id.* at 10-14 (Count One, means and methods); “other persons, who are known and unknown to the Grand Jury,” *see id.* at 86 (Count Two); “persons known and unknown to the Grand Jury,” *see id.* at 88 (Count Three); “other persons, known and unknown to the Grand Jury,” *see id.* at 99 (Count Four). Mr. Fariz cannot possibly review the discovery, investigate the case, and prepare for trial without being informed of the other alleged conspirators, beyond the ones that the Magistrate Judge ordered disclosed, given the temporal and geographic scope of this case. Indeed, the Magistrate Judge recognized this rationale for ordering a bill of particulars, Doc. 428 at 6, and this rationale extends to any alleged participants and coconspirators.

Courts have ordered the disclosure of alleged participants and coconspirators in a bill of particulars. As the former Fifth Circuit explained, “[a] bill of particulars is a proper procedure for discovering the names of unindicted coconspirators who the government plans to use as witnesses. It is not uncommon for the trial judge to require the government to disclose their names when information is necessary in a defendant’s preparation for trial.” *United States v. Barrentine*, 591 F.2d 1069, 1077 (5th Cir. 1979) (citing *Will v. United*

*States*, 389 U.S. 90, 99 (1967));<sup>3</sup> *see Anderson*, 799 F.2d at 1439 (noting that the magistrate judge had ordered, and the government provided under seal, a bill of particulars identifying the unnamed and unindicted participants in the alleged RICO conspiracy).

In the particular circumstances of this case, the disclosure of the alleged participants, members, and coconspirators (referred to in requests (a) and (e) above) is necessary for Mr. Fariz to prepare his defense and avoid surprise at trial. The number of alleged participants, members, coconspirators is potentially quite large. Mr. Fariz himself is alleged in relatively few instances in the indictment; he is mentioned in only 17 of 256 alleged overt acts. Therefore, Mr. Fariz is unlike other defendants where the Eleventh Circuit found that the trial court had not abused its discretion in denying a bill of particulars, because Mr. Fariz is not himself alleged to be directly involved in the vast majority of the alleged activity, and would therefore not know the requested information himself. *Cf. Cole*, 755 F.2d at 760-61 (holding that the defendants could not have been surprised at trial, where the defendants had participated in the conversations and activities at issue); *Colson*, 662 F.2d at 1391 (holding that the district court did not abuse its discretion in denying particulars as to, *inter alia*, the identity of unindicted coconspirators, where the defendant had knowledge of the identities and impeached several of the witnesses at trial). As the government seeks criminal liability against Mr. Fariz as an alleged member of the conspiracy, including for actions and activities

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<sup>3</sup> In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions handed down by the former Fifth Circuit before October 1, 1981.



in which Mr. Fariz is not alleged to have been directly involved, Mr. Fariz must be provided the identities of alleged participants and coconspirators in order to prepare his defense and avoid surprise at trial.

Similarly, the indictment alleges wide-ranging activities on the part of the Defendants, “enterprise members,” and coconspirators that allegedly involve other individuals, including those specified in requests (b)-(d) and (f)-(i) above. For many of these activities, Mr. Fariz is not alleged to be directly involved, but is alleged to be a conspirator subject to criminal sanctions. In order to prepare his defense and avoid surprise at trial, Mr. Fariz must be provided with the information as the identities of persons and entities that are the subject of the allegations in the indictment. Accordingly, Mr. Fariz respectfully submits that the Magistrate Judge erred in failing to apply the appropriate standard for a request for a bill of particulars as to the identities of individuals alleged in the indictment.

## **2. Insufficient Allegations of Criminal Conduct**

The Magistrate Judge’s Order fails to address Mr. Fariz’s requests for particulars as to certain inadequacies in notice concerning the allegations of criminal conduct. For example, Mr. Fariz requested:

- (a) the subsection of murder statute at issue in Count One. *See* Doc. 1, Count One Request 7;

- (b) the nature of material support or resources alleged to have been provided to designated foreign terrorist organizations. *See id.*, Count One Request 15;
- (c) the types of types of instrumentalities and facilities utilized. *See id.*, Count One Request 40; and
- (d) the statute under which actions would constitute the offense of murder, kidnaping, or maiming if committed in the special maritime and territorial jurisdiction of the United States. *See id.*, Count Two Request 8.<sup>4</sup>

The indictment alleges four conspiracies. Three of these conspiracies (Counts One, Two, and Three) are alleged to have begun in the 1980s,<sup>5</sup> and the fourth is alleged to have begun in 1995. Some of the alleged conduct is “described in such general terms that refer

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<sup>4</sup> Some of these requests have been separately argued as grounds for motions to dismiss that Mr. Fariz and the other Defendants have filed. *See, e.g.*, Doc. 301, Mr. Fariz’s Motion to Dismiss Counts Three and Four, at 6-9 (arguing that Count Three should be dismissed because it fails to provide sufficient notice of the charges against Mr. Fariz, including failing to specify the types of material support or resources allegedly provided to designated foreign terrorist organizations); Mr. Ballut’s Motion to Dismiss, at 10 (discussing missing element of 18 U.S.C. § 956 not plead in Count Two). Mr. Fariz stands by his arguments in his motions to dismiss on these grounds, and reasserts that a bill of particulars is not an appropriate means to correct an insufficient indictment. Instead, dismissal is appropriate. *See Russell v. United States*, 369 U.S. 749, 769-79 (1962). Should the Court find that dismissal is not warranted, Mr. Fariz has submitted his request for a bill of particulars as to these issues in the alternative.

<sup>5</sup> The Magistrate Judge noted that the government has limited the scope of the conspiracy alleged in Count Three by its incorporation of overt acts only after the 1997 designation. Doc. 428 at 7.

to so broad a class of activity that they would require an exceedingly extensive investigation by defense counsel,” and therefore a bill of particulars is required. *See United States v. Bin Laden*, 92 F. Supp. 2d 225, 236 (S.D.N.Y. 2000). For example, as to Count Three,<sup>6</sup> the indictment alleges actions as broad as “Throughout the remainder of the 1990’s to the present, SAMI AMIN AL-ARIAN, SAMEEH HAMMOUDEH, HATIM NAJI FARIZ, GHASSAN ZAYED BALLUT, BASHIR MUSA MOHAMMED NAFI and others would and did continue to engage in PIJ fund-raising and *support activities* in a manner designed to conceal the nature of what they were doing and the source and recipients of the support.” (Doc. 1 at 94). For Mr. Fariz to defend against this conspiracy allegation, he would need to examine the activities of the alleged coconspirators and “others” since at least 1997 to the date of the indictment and try to determine any activity that could be construed as “support activities.” This position is unduly burdensome to the defense, particularly when coupled with Mr. Fariz’s argument that he has not been provided sufficient notice of which of the 17 or 18 types of material support or resources, as defined in 18 U.S.C. § 2339A, are alleged to be at issue in this case. *See Bin Laden*, 92 F. Supp. 2d at 235-40. Accordingly, Mr. Fariz respectfully requests that this Court reconsider Mr. Fariz’s request for a bill of particulars.

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<sup>6</sup> Count Three charges Mr. Fariz with conspiracy to knowingly provide material support and resources to a designated foreign terrorist organization, namely the Palestinian Islamic Jihad (“PIJ”), in violation of 18 U.S.C. § 2339B.

### **3. Codes Alleged in the Indictment**

The Magistrate Judge quoted extensively from the language of *United States v. Bin Laden*, 92 F. Supp 2d 225, 234-35 (S.D.N.Y. 2000), in its analysis regarding the merits of a defense request for a bill of particulars in cases that are exceedingly complex, charge violations that span continents and decades, and contain voluminous discovery. *Bin Laden* also involved a request for a bill of particulars addressing allegations that the defendants ALI MOHAMED and WADIH EL HAGE engaged in coded correspondence with other members and associates of the al Qaeda organization. The court premised its analysis of the defendants' request on a fundamental determination that "It is the nature of 'coded correspondence' that the documents are not self-identifying." *Id* at 240. The court further stated that "unless the Defendants know the date or subject matter of the correspondence, or are provided with some other means of identification, it would be impossible for them to determine the documents to which the Indictment refers...without some additional identifying information, the bare allegation that two defendants engaged in 'coded correspondence' requires supplementation with at bill of particulars." *Id*. Distinguishing bare allegations of the use of "coded correspondence" from others in the Indictment which included specific dates or included additional identifying details, as in additional information which identified the specific document wherein the coded correspondence was alleged to have been used, the court in *Bin Laden* ruled that where "the allegation contained in the Inditment contain(s) no identifying information whatsoever and merely refers generally to 'coded correspondence,' ... a bill of particulars is required."

Paragraph 41 of the instant Indictment alleges that “the enterprise members would and did utilize codes in conversations and communiques to conceal and disguise the enterprise’s true activities and identities of members.” Paragraph 41 fails to allege specific dates, conversations, participants or specific correspondence wherein codes were to have been utilized. The allegations of Paragraph 41 can only be described as a bare allegation. It fails to allege dates, conversations, participants or specific references to peculiar conversations or communiques as necessary to allow Mr. Fariz to identify and respond to the allegations.

The Magistrate Court’s summary denial of Mr. Fariz request for a Bill of Particulars concerning Paragraph 41’s mention of “codes in conversations and communiques” inexplicably relies on the language of *Bin Laden* without applying the analysis incorporated therein. There is in fact no analysis present within the Magistrate Court’s denial of this request and therefore no basis for this Court to otherwise accede to the Magistrate Court’s discretion. The Magistrate Court’s bare assertion the Indictment is highly specific is belied by a simple examination of Paragraph 41. When exposed to the light of a fundamental understanding of the inherent vagaries of “coded” communications it is apparent that the fundamental considerations of fairness and due process encapsulated by Federal Rule of Criminal Procedure 7(f) demand the reconsideration of Mr. Fariz motion.

WHEREFORE, Defendant, Hatim Naji Fariz, respectfully requests that this Honorable Court reconsider the Magistrate Judge's Order denying in part (Doc. 428) Mr. Fariz's Motion for a Bill of Particulars.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

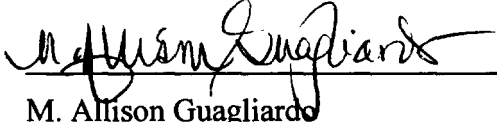
I hereby certify that on this 4<sup>th</sup> day of February, 2004, a copy of the foregoing has been furnished by hand delivery to Walter E. Furr, Assistant United States Attorney, United States Attorney's Office, 400 North Tampa Street, Suite 3200, Tampa, Florida 33602 and by U.S. Mail to the following:

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